St. Francis Healthcare Centre *and* District 1199, the Health Care and Social Services Union, SEIU, AFL–CIO. Case 8–CA–29739

October 1, 2001

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF THIRD ELECTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On May 3 and June 29, 2001, respectively, Administrative Law Judge John T. Clark issued the attached supplemental decision and second supplemental decision. Thereafter, the Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached decisions in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified here, and to adopt the recommended Order.

[1] As set forth in the judge's decision, the findings and conclusions reached here result from application of *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984), which we must apply as the law of the case pursuant to our acceptance of the 6th Circuit's decision and remand order in this proceeding. *NLRB v. St. Francis Healthcare Centre*, 212 F.3d 945 (6th Cir. 2000). Furthermore, we also accept as the law of the case the court's statement that the Respondent had presented evidence with respect to four of the five factors in the *Van Dorn* standard that "[i]f proven, . . . would justify setting aside the election." Id. at 964.

In light of the court's opinion, we affirm the judge's conclusion that the preelection circulation of a letter purporting to be from former employee Shirley Biddle involved objectionable misrepresentation under the *Van Dorn* standard. We do not rely on the Respondent's concern about the Board's 24-hour rule (prohibiting massed assemblies on company time within 24 hours before the start of an election) as evidence that the Respondent did not have sufficient time to respond to the Biddle letter. We agree that other evidence cited by the judge is sufficient to show that Respondent did not have sufficient time to respond. We also do not rely on the subjective view of employee Kim Miller as evidence that employees were affected by the misrepresentation. Instead, we find that there is sufficient objective evidence to warrant finding that the Biddle letter had a reasonable possibility of affecting employees in their electoral choice.

Member Liebman concurs in affirming the judge's application of the *Van Dorn* standard as the law of the case and setting aside the election. In doing so, she relies on the timing of the misrepresentation, the lack of an opportunity for the Employer to respond, and the nature and extent of the misrepresentation, as detailed in the judge's recommendations. In the absence of affirmative evidence regarding how employees were affected by the misrepresentation and the clear identification of Biddle as the author of the letter, she would not rely on the other factors set forth in *Van Dorn*.

ORDER

The National Labor Relations Board orders that the certification issued in Case 8–RC–15410 is revoked and that the complaint in Case 8–CA–29739 is dismissed.

[Direction of Third Election omitted from publication.]

Steven Wilson, Esq., for the General Counsel.
Todd L. Sarver, Esq., of Columbus, Ohio, for the Respondent.
Michael J. Hunter, Esq., of Columbus, Ohio, for the Union.

SUPPLEMENTAL DECISION ON REMAND

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Fremont, Ohio, on March 1, 2001. On May 19, 2000, the United States Court of Appeals for the Sixth Circuit issued a decision[1] denying enforcement of a National Labor Relations Board (the Board) Order,[2] finding that St. Francis Healthcare Centre (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by refusing to bargain with District 1199, Health Care and Social Services Union, SEIU, AFL–CIO (the Union). The Union was certified on April 24, 1997, and the Board's bargaining order issued June 12, 1998. The court considered the Respondent's objection to the second representation election, which had been rejected without a hearing, and remanded the proceeding to the Board for an evidentiary hearing on the objection. The objection was based on a letter, allegedly written by a former employee, challenging the Respondent's statements that its management officials had not received wage increases within the year before the second election. By Order dated December 15, 2000, the Board accepted the court's remand as "the law of the case" and, pursuant to that Order, this hearing was conducted.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the Respondent,[3] I make the following

FINDINGS OF FACT

The following factual narrative is based, in part, on the credited testimony of the Respondent's two witnesses. Joan Schmidt is the Respondent's director of human resources and Kim Miller, a longtime former employee, who was eligible to vote in the representation election. Because they were the only witnesses to testify, there is no contradictory testimony, however, they did appear to have the testimonial demeanor of honest, sincere, and truthful witnesses.

The Respondent is a nonprofit corporation, which is owned by the Franciscan Sisters of Our Lady of Perpetual Help. It provides around-the-clock care and a variety of health services for elderly and physically challenged persons. On March 20 and 21, 1997, the dates of the second election, approximately 500 employees were employed by the Respondent.

A major issue in the second election, as it was in the previous election 5 months before, was the Respondent's economic well-

[1] 212 F.3d 945.
[2] 325 NLRB 905 (1998).
[3] The Union did not present any witnesses, nor did it file a brief.

being and employee wages. Shortly before the second election the Union distributed literature which accused management in general, and the chief executive officer, Greg Storer, specifically, of receiving wage increases (Emp. Exh. 4). In response, on March 13, 1997, the Respondent issued a letter to the employees stating that the last salary increase for all employees was March 1996 and that Storer had not had a salary increase since October 1995. The letter was signed by Sister Monica Laws, OSF, a member of the religious order which owns the Respondent corporation, as chair of the board of trustees and James K. Walter, chair of the finance committee.

On March 19,1997, Chief Operating Officer Marlon Kiser gave Schmidt, the director of human resources, a handwritten letter that was purportedly written and signed by Shelly Biddle.[4] Biddle, a former employee who was not an eligible voter in the upcoming election, had been Schmidt's secretary in the human resources department. Schmidt identified the handwriting as Biddle's. One of Biddle's duties had been to maintain and update all of the employee personnel files, including updating wage and salary information. Biddle was terminated on November 8, 1996, for falsifying paid-time-off records. As a matter of policy the Respondent did not communicate to the employees the reason for Biddle's termination.

The Biddle letter stated that Sister Monica's letter was not only untrue, i.e., that raises were given to certain members of management within the past year, but that the check amounts were backdated and the difference was given in a separate check. The letter also intimates that Biddle's discharge was somehow related to this allegation.[5] There was no evidence of any involvement in the letter by anyone other than Biddle.

Schmidt testified that no response to the Biddle letter was forthcoming because (1) there was not sufficient time to prepare and issue an effective response because the Respondent only became aware of the letter on the day before the election; (2) it was concerned about violating federal labor law by communicating with employees within 24 hours of the opening of the voting polls; and (3) to be effective the Respondent would essentially have to disclose its payroll records in order to prove that it had not backdated any pay raises.

Former employee Miller testified that she received the Biddle letter, by mail, at her home, 2 or 3 days before the election. She had no reason to believe that the letter came from anyone other than Biddle. She was confused, not only because it contradicted the letter from Sister Monica, but, because she knew that Biddle's former position gave her "access to sensitive material." Miller stated that Biddle was well known and well liked by the employees, and that her letter was a major topic of conversation until just before the election. It is also apparent from Miller's testimony that, as the Sixth Circuit stated, the letter "was mailed to all bargaining unit members at their homes." 212 F.3d at 962.

The election was held as scheduled on March 20 and 21, 1997. The Union won the election 68 for; 61 against; with 6 challenged ballots. In early April 1997, the Respondent learned that the Union was responsible for mailing the "Biddle Letter," a fact that was stipulated to at the hearing. The Respondent objected to the results of the election contending that the letter contained misrepresentations that interfered with the employees' ability to decipher the truth. That argument was rejected without a hearing, and the issue was appealed to the Court of Appeals for the Sixth Circuit. *NLRB v. St. Francis Healthcare Centre,* 212 F.3d 945 (2000).

Analysis and Conclusions

It is not disputed, and I find, that the Biddle letter contained gross and material misrepresentations that some employees received wage increases contrary to the Respondent's statements, that the increases were fraudulently concealed by backdating and issuing separate checks, and that the letter also intimates that Biddle's discharge was somehow related to this allegation. Pursuant to the Sixth Circuit's remand order, the letter must be evaluated in light of *Van Dorn Plastic Machinery Co. v. NLRB,* 736 F.2d 343 (1984), and its progeny.

In *Van Dorn,* the court carved out a narrow exception to the standards articulated by the Board in *Midland National Life Insurance Co.,* 263 NLRB 127 (1982), in evaluating whether campaign literature interfered with employees' free choice in a representation election. The court held:

> There may be cases where no forgery can be proved but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected. We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made. [*Van Dorn,* supra at 348.]

The court applies the standard by assessing a number of factors, including: (1) the timing of the misrepresentation; (2) whether the employer had an opportunity to respond; (3) the nature and extent of the misrepresentation; (4) whether the source of the misrepresentation was identified; and (5) whether there is evidence that employees were affected by the misrepresentation. The closeness of the election is an important consideration in evaluating the fifth factor. None of the factors, standing alone, is dispositive. *St. Francis,* supra at 964, and cases cited therein.

[4] Schmidt credibly testified that Kiser told her that the letter had been brought to the facility on that same day, by employee Donna Howell. According to Schmidt, Kiser said that Howell gave the letter to Supervisor Dan Blue, who gave it to Kiser. Of the participants, only Schmidt is currently employed by the Respondent. The Union's counsel objected to this testimony as hearsay. I overruled his objection because generally, "administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies." *Midland Hilton,* 324 NLRB 1141 fn. 1 (1997). Additionally, the envelope was postmarked on March 17, 1997, at Columbus, Ohio, thus I find it inherently probably that the letter was received by Howell on March 18 and taken to work on March 19 exactly as Kiser told Schmidt.

[5] The relevant portion of the letter follows:

> According to a letter from Sr. Monica, no raises were given to management. I can tell you this is not true. Raises were given to certain members of management. Not only did they receive a raise, but the amount was back dated and the difference was given in a separate check. Their inconsistencies not only cost myself and fellow co-workers their jobs, but created intimidation and fear for our co-workers.

Schmidt testified that the envelope containing the Biddle letter, that was mailed to employee Howell, was postmarked on March 17,1997, at Columbus, Ohio, a distance of approximately 120 miles from the Respondent's facility in Green Springs, Ohio. The letter was mailed to the employees' homes only 3 days before the election. As the court stated:

> It is reasonable to infer that employees did not actually receive the letter until two days before the election, at most, and perhaps one day. We explicitly disapproved of such conduct in an analogous case where a letter overstating the company's profits was mailed to employees three days before an election. *Dayton Hudson Dep't Store Co. v. NLRB,* 79 F.3d 546, 551 (6th Cir. 1996). [*St. Francis,* supra at 964.]

St. Francis had an even shorter time frame to respond to the letter than the employees did to consider it. I find that the Respondent first saw Howell's copy of Biddle's letter during the morning of March 19. This finding is based on Schmidt's credited testimony that the Respondent was concerned about conducting employee meetings within 24 hours of the opening of the polls. The 24-hour period would begin at noon on March 19. I have also assumed that the chief operating officer and the director of human resources arrived at the facility sometime after 8 or 9 a.m. on March 19. I find that the Respondent did not have a reasonable opportunity to effectively respond to the gross misrepresentations contained in the Biddle letter. At the very least, the Respondent would have had to undermine Biddle's credibility, and provide a reason why she would write the falsehoods. It then would have to show, somehow, that no raises, backdated or otherwise were given. Announcing the reason for Biddle's discharge would have gone against the Respondent's policy and trying to prove a negative would have been difficult, if not impossible. I find that the extent of the misrepresentations, the former "sensitive" position held by Biddle, and the brief time frame within which the Respondent had to act, essentially prevented it from formulating and issuing an effective response. I find that the first two factors, relied on by the Sixth Circuit, favor the Respondent.

The third, and most important, factor also favors the Respondent. It is undisputed that wages, raises, and the Respondent's long-term financial viability were major issues for both parties. The Biddle letter challenges the Respondent's credibility, both as to the fact that raises were given to certain individuals and that the Respondent engaged in a coverup to prevent other employees from learning the amounts of the raises and the recipients. The letter also intimates that Biddle's discharged was somehow related to this allegation. The letter was written and signed by a well-known and well-liked former employee, who held a sensitive position in the human resources department. Biddle was responsible for ensuring that all employee personnel records were up-to-date, including current wage rates and the amount of the last raise. It is not surprising that "everybody was talking about [the letter] a day or two right before the election," as former employee Miller testified. Accordingly, I find that this factor strongly favors the Respondent.

The fourth factor involves the source of the letter. Joan Schmidt, director of human resources, testified that Biddle was her secretary from October 1991 until Biddle's discharge on November 8, 1996. Schmidt was familiar with Biddle's handwriting and signature and she testified that Biddle both wrote and signed the letter. Schmidt testified that she did not receive the envelope that contained the "Biddle Letter" until after the election, sometime in early April 1997. Although Biddle's return address, in Green Springs, Ohio, was on the envelope, Schmidt noticed that the letter had been processed by a postage meter in Columbus, Ohio. She called the Post Office and was informed that the meter was registered to the Union, a fact to which the Union has stipulated. The court, in its remand, stated, "[W]e do not believe that most employees would assume that the letter was Union-sponsored propaganda simply because it addressed an issue that the Union had raised in earlier campaign literature." Id. at 965. The document both in form, a handwritten letter, and in substance, using language such as "we" and "fellow coworkers" appears to be a personal message from a former coworker. Indeed, former employee Miller testified that it was her belief that the letter was written and sent by Biddle, without anyone else being involved. On its face the letter appears to be a third party communication from Biddle to the employees. In fact, it was the Union that was responsible, at the very least, for the dissemination of the letter to the homes of the eligible voters. There has been no argument advanced that the letter was, in any way, a straightforward third party communication. That is, however, the way the letter was understood by Miller and, I find, how it was intended to be understood. Nowhere, on either the letter or the envelope, is the Union's responsibility for the mailing made clear. I find that to be an "artful deception" about which the court spoke in *Van Dorn*. The fourth factor, therefore, also strongly favors the Respondent.

Miller, who was eligible to vote in the second election and who supported the Respondent, testified that the letter confused her and caused her to "stop and think." She indicated that this was because of the content of the letter and the author, who because of her former job as secretary to the director of human resources, was in a position to have knowledge of the subject matter about which she wrote. Miller testified that the letter was a prime topic of conversation right up until the election. The Respondent contends that if the "Biddle Letter" had such an effect on as strong a supporter of the Respondent as Miller, it also would have affected others, who were less sure of their position. As the court has observed, "[E]ven ignoring the challenged ballots, if the Biddle letter affected the vote of four employees, it impacted the election decisively." I find that the fifth factor also favors the Respondent.

CONCLUSION

Having applied the Sixth Circuit's decision as "the law of the case," as directed by the Board's remand, I have found that the foregoing five factors favor the Respondent. I further find that the misrepresentations contained in the "Biddle Letter" were so pervasive and the deception so artful that employees were unable to separate truth from untruth and the misrepresentations interfered with the employees' right of a free and fair choice in the representation election. Because I recommend that the Respondent's objection to the second election, held on March 20 and 21, 1997, be sustained, I also recommend that the complaint, in Case

8–CA–29739, upon which the Board based its summary judgement finding of a technical 8(a)(5) and (1) failure to recognize and bargain violation (325 NLRB 905 (1998)), be dismissed. I will also recommend that the Board reopen Case 8–RC–15410, rescind the Union's certification, and direct a third election.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union based on the Union's certification in Case 8–RC–15410.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed. It is further recommended that the Board reopen Case 8–RC–15410, that the certification issued on April 24, 1997, be rescinded, and that the Board direct a third election.

Steven Wilson, Esq., for the General Counsel.
Todd L. Sarver, Esq., of Columbus, Ohio, for the Respondent.
Michael J. Hunter, Esq., of Columbus, Ohio, for the Union.

SECOND SUPPLEMENTAL DECISION ON REMAND

STATEMENT OF THE CASE

On May 3, 2001, the supplemental decision on remand was issued in this case (JD–62–01). Thereafter, it was discovered that the Union had filed a brief, which had not been considered by the administrative law judge. On May 9, the National Labor Relations Board remanded the case to me for reconsideration in light of the Union's brief. The Board also remanded the Union's motion to disqualify the administrative law judge and the Respondent's opposition thereto.

I. THE UNION'S MOTION TO DISQUALIFY THE ADMINISTRATIVE LAW JUDGE

The Union contends that this case should be reassigned to another judge because my previous decision was adverse to the Union's position. It posits that, after considering the Union's brief, I "would be left having to overturn his own decision" and this "prospect does not leave the Union on equal footing before the law." In a similar, if not identical argument, the Union states that because I have ruled on the matter "it is impossible to place [its] arguments in a place where they are given equal dignity of those of the Employer."

I disagree. The remand was the result of a ministerial error. The Union's brief arrived at the Board, but did not arrive at my office. Once the error was discovered, the Office of the Executive Secretary was informed, and I instituted the necessary procedures to prevent a reoccurrence. Although the error is regrettable, in no way has it impacted on my ability to objectively evaluate the Union's arguments.

Procedurally, this motion is on a somewhat different footing than that envisioned by Section 102.37 of the Board's Rules and Regulations, which addresses motions to disqualify administrative law judges. The case law, however, is analogous. The most commonly advanced assertions for disqualification, "bias" and "prejudice," are not contained in the Union's motion. The motion does contain statements about "equal dignity" and "fair play." General statements and conclusions drawn therefrom fall far short of demonstrating the lack of objectivity necessary to justify the relief requested. *Garry Mfg. Co.,* 242 NLRB 539 (1979).

It appears that the Union's sole concern is that because the initial decision on remand was adverse to its position, I would feel compelled to reaffirm that decision, even after considering its brief, because of a reluctance to reverse myself. The Union offers no objective evidence for this concern, and indeed there is none. See *Liteky v. U.S.,* 510 U.S. 540, 555 (1994), "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Its contention also appears to be contrary to the general administrative practice of remanding a case to the same judge who initially heard the case. This practice is the most efficient in terms of time and money and, absent an unusual circumstance, such as evidence of bias or prejudice, is the usual remand situation. The Board is reluctant to find that an administrative law judge is bias or partial merely because the judge resolves all issues in favor of one party. Furthermore, the Board, quoting the Supreme Court's decision in *NLRB v. Pittsburgh Steamship Co.,* 337 U.S. 656, 659 (1949), held that even "the total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." *Control Services,* 315 NLRB 431, 432 (1994); *R.E.C. Corp.,* 296 NLRB 1293 (1989).

Although the mistake is regrettable, the Union's motion is totally without merit and it is denied. I now address the contentions set forth in the Union's brief on the merits.

II. THE UNION'S CONTENTIONS

A. Timing of the Misrepresentation

The Union states that it is "abundantly clear" that the Employer was aware of the representations contained in the Biddle letter "well before" the letter was mailed, and thus, neither the Employer nor the employees were "blindsided" by the allegations. In support of this contention, the Union stresses that Schmidt, the director of human resources, admitted that she had heard that Biddle was telling employees that she (Biddle) had documents proving that management had received a recent pay increase. Schmidt credibly testified that she could not recall when she had heard this information (Tr. 35–38).

The Union next offers that Kim Miller's testimony "confirmed that she was not at all shocked by the letter, because everyone already knew that Biddle was making these accusations." Miller's testimony, on direct examination, was that she was "surprised and confused" when she received the letter. Her

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

surprise was that Biddle, whom Miller had reason to believe opposed the Union (Tr. 62), would send the letter. Her confusion was because Biddle's allegations regarding the raises were in direct conflict with the statements in Sister Monica's letter to the employees (Tr. 55). On cross-examination, after counsel for the Union established why Miller thought that Biddle was antiunion, he asked:

> Q. Okay. So you were working on keeping the Union out. By the time you got this letter, you weren't particularly shocked. Because for whatever reason, you became aware that Ms. Biddle for some reason had turned in her sympathies, correct?
>
> A. Correct [Tr. 62].

Based on the foregoing, I find that Miller's testimony relating to shock was directed at Biddle's change of allegiance, and not caused by the receipt of the letter, the contents of which caused her to be confused. Miller also acknowledged that she had heard, before receipt of the letter, "through hearsay" that Biddle had evidence of recent wage increases.

At most, the testimony establishes that there was a rumor that Biddle had evidence of recent wage increases. It does not establish when the rumor began or how extensively it was disseminated. Assuming that the Employer was aware of the rumor, before it had knowledge of the letter, there is little more that it could have done. Sister Monica's letter, issued in response to the Union's literature, had already denied any wage increase. The rumor, as Miller testified, was "hearsay" and there is no evidence that any management official or employee had heard Biddle make any statement. Cf. *NLRB v. Superior Coatings, Inc.,* 839 F.2d 1178, 1183 (6th Cir. 1988), where the court noted that management was notified of the specific misstatements.

B. The Employer's Opportunity to Respond

The Union argues that the Employer could have responded to the Biddle letter, notwithstanding the limited amount of time available, because there was no reason to keep the reason for Biddle's discharge confidential. The Union contends that "the record demonstrates that everybody in the unit knew about her termination in all of its details." (U. Br. sec. 2.) Contrary to the Union's contention former employee Miller testified that months before the election she had heard a rumor that Biddle had been terminated for theft. Her testimony does not establish the pervasiveness of the rumor among the employees. More importantly Human Resources Director Schmidt, credibly testified that the reason for the discharge of Biddle, and her accomplice, was never released by the Employer.

It was only after the Employer received the Biddle letter that it became aware of Biddle's specific allegations. Although the need to effectively refute the allegations, and provide a motive for the false assertions, was apparent, Schmidt testified that she did not want to release the confidential information regarding Biddle's discharge. She was also concerned that she would have to review, and perhaps reveal, the payroll records in order to effectively repudiate Biddle's allegations. Another general denial would have little impact when juxtaposed with allegations written by an employee, who by virtue of her previous, sensitive, position, certainly was viewed as an authoritative source.

This is not to say that some managers may have responded to questions from individual employees about the Biddle letter. (GC Exh. 2, p. 99.) But any response from most managers or supervisors regarding retroactive pay increases would not command the same respect as Biddle's contrary statement simply because of her former sensitive position.

Although the Employer did issue a memo to its managers explaining the reason for Biddle's discharge, the memo was not sent until after the start of the election. The memo did not authorize or encourage the managers to share the information with the employees. Nor did it address Biddle's allegations of backdated pay raises. Indeed, it was not until a few weeks before the hearing, after Schmidt had reviewed the files of all the managers from March 1996 until the election, was she able to state with certainty that none of the files contained any evidence of a pay change (Tr. 41).

C. Nature and Extent of the Misrepresentation

The Union submits that the Employer has "only weakly established, at best" that the allegations contained in the Biddle letter were misrepresentations. I have found in the Supplemental Decision that the letter contained gross and material misrepresentations. Having reviewed the record, including the Union's brief, I see no reason to change that finding.

The Union also contends that the material contained in the letter is not of a nature that the employees would be unable to make an informed decision in the election. It reasons that because "everyone" knew of Biddle's dispute with the hospital before the letter was published, "it contained no bombshells." Although there is evidence that there were rumors concerning Biddle's discharge, and knowledge she may have had regarding pay raises, it is unclear how extensively these rumors were circulated among the employees and managers of the Employer. What is clear is that pay raises were a major issue in the election. The Union was contending that some individuals had received pay raises. The letter from Sister Monica denied that the Employer had given any pay raises. Thereafter, only 2 days, at most, before the election, the employees received a personal letter from Biddle, the popular and well-known former secretary to the director of human resources. Biddle unequivocally states that Sister Monica's letter is a lie, that Biddle not only knows that certain members of management received raises, but that there was a coverup to prevent this fact from being exposed. The letter also implies that Biddle's discharge is somehow related to her knowledge of the coverup. These misrepresentations far exceeded the rumors about which the witnesses testified. This third, and most important factor, strongly favors the Employer.

D. The Source of the Misrepresentation

There is no record evidence proving that the Union was involved in drafting or sponsoring the letter. The Union stipulated that it was responsible for mailing the letter. Thus, it is also responsible for the timing of the arrival of the letter in the employees' homes. The Union contends that the Columbus, Ohio postage meter stamp, rather than proof of deception, is

evidence of a lack of deception. The Union suggests that one need not be a highly trained investigator to realize that the letter was mailed by someone other than Biddle, who lived in Green Springs, Ohio. I am doubtful that most people who receive an envelope with a handwritten address, and a local return address, would even notice the postmark. If the postmark was noticed, it would only indicate the location from which the letter was mailed and not the entity that was responsible for the mailing. The Union's involvement in the dissemination of the letter, without making its involvement known to the recipients of the letter, strongly favors the Employer.

E. Whether There is Evidence that Employees were Affected by the Misrepresentation

The Union argues that the only evidence of how the misrepresentation affected the employees is Miller's statement that the letter caused her to be confused. The Union then submits that the source of Miller's confusion was actually the rumor that Biddle had documents showing that management had previously been given pay increases and not the letter. As I found in the supplemental decision, and again in section A, above, Miller's confusion was a result of the misrepresentations contained in the Biddle letter. She testified that her confusion was caused by Biddle's written contradiction of Sister Monica's denial that any one had received a pay increase (Tr. 55). Her testimony shows that her confusion was exacerbated because she knew, and liked, Biddle. Miller was aware that Biddle had held a sensitive position in the human resources department, which would have allowed her to be privy to wage information, as Biddle alleged in her letter. Miller also credibly testified that the letter was a topic of conversation among "everybody."

There is no evidence that the misrepresentations caused any change in a vote. Miller, who indicated that she was never in favor of the Union, did testify that the letter confused her and caused her to "stop and think." I do not believe that it is unrealistic, in light of the fact that a change of four votes could have changed the outcome of the election, and the nature and extent of the misrepresentations, to surmise that the Biddle letter could have had a decisive impact on the election. I also find that this factor favors the Employer.

II. CONCLUSION

Based on the foregoing I reaffirm the supplemental decision on remand, which was issued on May 3, 2001.